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American Alpha Construction, Inc. and United Order of American Bricklayers and Stone Masons Local No. 21 Illinois, affiliated with the International Union of Bricklayers and Allied Craftworkers, AFL-CIO. Case 13-CA-40937-1

September 26, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and first amended charge filed by the Union on March 27 and June 6, 2003, respectively, the General Counsel issued the complaint on June 9, 2003, against American Alpha Construction, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the Act. The Respondent failed to file an answer.

On July 18, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On July 24, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by June 23, 2003, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter and facsimile dated July 2, 2003, notified the Respondent that unless an answer was received by July 10, 2003, a motion for default judgment would be filed.

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

In the absence of good cause being shown for the failure to file a timely answer,² we grant the General Counsel's Motion for Default Judgment insofar as the complaint alleges that the Respondent has committed violations of Section 8(a)(1) and (3) of the Act. As indicated below, several of those alleged violations are the unlawful refusals to hire and/or consider for hire four job applicants. Thus, the complaint alleges and, by its failure to file an answer, the Respondent has admitted, that since two different dates in March 2003, the Respondent "has refused to consider" four named applicants "for available positions with Respondent" and "has refused to hire" those applicants "for available positions with Respondent for which the stated individuals were qualified." The complaint further alleges and, by its failure to file an answer, the Respondent has admitted, that the Respondent engaged in this conduct "because the named individuals supported and assisted the Union and engaged in concerted activities and to discourage employees and other individuals from engaging in these activities." We find that the undisputed complaint allegations are sufficient to establish these violations under the standards set forth in *FES*, 331 NLRB 9 (2000), supp. decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). See *Jet Electric Co.*, 334 NLRB 1059 (2001), supp. decision 338 NLRB No. 77 (2002).

Under the *FES* standards, however, the complaint allegations are insufficient to enable us to determine the appropriate affirmative remedy. The Board held in *FES* that in cases involving more than one applicant, the General Counsel, in order to justify an affirmative remedy of reinstatement and backpay, must show at the unfair labor practice stage of the proceeding the number of openings that were available. 331 NLRB at 14. See also *Jet Electric Co.*, supra.

Here, the complaint fails to allege how many available positions the Respondent had for the discriminatee applicants. Accordingly, we shall hold in abeyance a final determination of the appropriate affirmative remedy³ for

² The Postal Service returned the unopened certified mail envelope containing the complaint and notice of hearing and first amended charge to the Regional Office marked as "Unclaimed." The Respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *I.C.E. Electric, Inc.*, 339 NLRB No. 36, slip op. at 1 fn. 2 (2003), and cases cited there.

³ The Board does not provide the standard *FES* remedy for a refusal-to-consider for hire violation where a more comprehensive reinstatement and backpay remedy for a refusal-to-hire violation is appropriate. This is because the limited remedy for a refusal to consider violation is subsumed within the broader remedy for the refusal-to-hire violation. Accordingly, whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted in this case will depend on whether the evidence shows that enough openings were available to

the Respondent's refusal-to-hire or consider-for-hire violations pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the four discriminatee applicants.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in West Chicago, Illinois (the Respondent's facility), has been engaged in the construction business as a masonry contractor.

During the calendar year preceding issuance of the complaint, the Respondent provided services valued in excess of \$50,000 for Comfort Inn Hotels, an enterprise directly engaged in interstate commerce, and other enterprises within the State of Illinois.

During that same time period, the Respondent, in conducting its business operations described above, purchased and received at its West Chicago, Illinois, facility goods valued in excess of \$50,000 directly from points outside the State of Illinois and from other enterprises located within the State of Illinois, each of which other enterprises had received these goods directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that United Order of American Bricklayers and Stone Masons Local No. 21 Illinois, affiliated with the International Union of Bricklayers and Allied Craftworkers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Nick N. Romanenko	President
Igor Khlimov	VicePresident/ Job Superintendent
Remegus (full name unknown)	Job Superintendent

On about March 4, 2003, the Respondent, by Nick Romanenko, at the Respondent's facility, interrogated its employees and/or job applicants about their union membership.

On about March 7, 2003, the Respondent, by Nick Romanenko, by telephone from the Respondent's facility, interrogated its employees and/or job applicants about their union membership.

On about March 11, 2003, the Respondent, by Igor Khlimov, at the Respondent's office, interrogated its employees and/or job applicants about their union membership.

The following members of the Union, on the dates listed opposite their names, sought jobs and attempted to submit job applications for employment with the Respondent at the Respondent's West Chicago, Illinois office:

Jose Alvarado	March 4, 2003
Mike Erdenberger	March 10, 2003
Steve Nelms	March 10, 2003
Don Newton	March 10, 2003

Since about March 4 and 10, 2003, the Respondent excluded the four individuals named above from the Respondent's hiring process by refusing to provide them with applications for future employment with the Respondent.

Since about March 4 and 10, 2003, and continuing to date, the Respondent has refused to consider Alvarado, Erdenberger, Nelms, and Newton for available positions with the Respondent, and has refused to hire them for available positions with the Respondent for which they were qualified.

The Respondent engaged in the conduct described above because the four individuals supported and assisted the Union and engaged in concerted activities and to discourage employees and other individuals from engaging in these activities.

On about April 5, 2003, the following employees of the Respondent, employed at the Respondent's Comfort Inn Hotel jobsite located on Higgins Road in Schaumburg, Illinois, ceased work concertedly and engaged in a strike:

James Allen	Huptych Krzystof
Robert Fital	Michael Lowery
Marcin Kazberuk	

This strike was caused by the Respondent's unfair labor practices described above.

On about April 10, 2003, by letter sent by certified mail and facsimile, employees Allen, Fital, Kazberuk, Krzystof, and Lowery made an unconditional offer to return to their former positions of employment. Since about that same date, the Respondent has failed and re-

justify the more comprehensive remedy of reinstatement and backpay for the refusal-to-hire violation. See *Jet Electric Co.*, supra at fn. 2.

⁴ A hearing will not be required if, in the event that the General Counsel amends the complaint, the Respondent fails to answer, thereby admitting facts that would permit the Board to resolve the remedial reinstatement and backpay issue. In those circumstances, the General Counsel may renew the Motion for Default Judgment with respect to this specific affirmative remedy. See *Id.*

fused to reinstate these employees to their former positions of employment.

CONCLUSIONS OF LAW

1. By interrogating employees and/or job applicants about their union membership, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. In addition, by refusing to provide employment applications to Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton, by refusing to consider for hire or hire them, and by failing and refusing to reinstate unfair labor practice strikers James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery upon their unconditional offer to return to work, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by failing and refusing to reinstate unfair labor practice strikers James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery upon their unconditional offer to return to work, we shall order the Respondent to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to expunge from its files all references to the unlawful failure to reinstate these five employees, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

Further, having found that the Respondent has unlawfully refused to consider for hire or hire Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton, we shall order the Respondent to expunge from its files all

references to these unlawful refusals, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.⁵

ORDER

The National Labor Relations Board orders that the Respondent, American Alpha Construction, Inc., West Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees and/or job applicants about their union membership.

(b) Excluding employee-applicants from its hiring process by refusing to provide them with applications for future employment with the Respondent because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

(c) Refusing to consider for hire or hire employee-applicants because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

(d) Failing and refusing to reinstate to their former jobs unfair labor practice strikers who have made unconditional offers to return to work.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful refusal to reinstate Allen, Fital, Kazberuk, Krzystof, and Lowery, and the unlawful refusal to consider for hire or hire Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton, and within 3 days thereafter, notify them in writing

⁵ As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy with respect to these violations.

that this has been done and that the unlawful conduct will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in West Chicago, Illinois, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 26, 2003

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees and/or job applicants about their union membership.

WE WILL NOT exclude employee-applicants from our hiring process by refusing to provide them with applications for future employment with us because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

WE WILL NOT refuse to consider for hire or hire employee-applicants because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

WE WILL NOT fail and refuse to reinstate to their former jobs unfair labor practice strikers who have made unconditional offers to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful refusal to reinstate Allen, Fital, Kazberuk, Krzystof, and Lowery, and the unlawful refusal to consider for hire

or hire Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that

the unlawful conduct will not be used against them in any way.

AMERICAN ALPHA CONSTRUCTION, INC.